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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the United States Court of Customs and Patent Appeals

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BRIEF FOR THE PETITIONER

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT	3
Background	3
Decision of the Customs Court	5
Decision of the Court of Customs and Patent Appeals	6
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. This Court Has Ruled That The Remission Of A Tax On Products Exported To The United States When Such Products Are Subject To Tax In Their Country Of Production Constitutes A Bounty Or Grant Under The Countervailing Duty Law, And This Ruling Has Been Ratified By Congress	9
II. Congress Did Not Acquiesce In Any Treasury Department Practice To Countervail "Excessive" Tax Remissions Only	19
III. The Secretary Of The Treasury Did Not Make A Determination That The Economic Result Of The Remission Of The Commodity Tax Is Not The Conferring Of Such A Benefit, Subsidy, Or Incentive As Would Rise To The Level Of A Bounty Or Grant Under Section 303	36
CONCLUSION	44
APPENDIX TO BRIEF	1a

CASES: Page

American Express Company v. *United States*, 472 F.2d 1050 (C.C.P.A. 1973) 38
American Express Company v. *United States*, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973) 11
Downs v. *United States*, 187 U.S. 496 (1903) ..5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 39
Downs v. *United States*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 14
Downs v. *United States*, 4 Treas. Dec. 405, T.D. 22984 (Bd. Gen. App. 1901), *aff'd*, unpublished (C.C. Md. 1901), *aff'd*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) 12, 14
Eisner v. *Macomber*, 252 U.S. 189 (1920) 15
F. W. Meyers & Co. v. *United States*, 6 Treas. Dec. 260, T.D. 24306 (Bd. Gen. App. 1903) 11, 16
Hammond Lead Products, Inc. v. *United States*, 306 F.Supp. 460 (Cust. Ct. 1969), *reversed on jurisdictional grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 11
Hecht v. *Malley*, 265 U.S. 144 (1924) 19
Massachusetts v. *United States*, 333 U.S. 611 (1948) .. 15
Nicholas & Co. v. *United States*, 249 U.S. 34 (1919) ..5, 7, 10, 11, 14, 17, 18, 19, 36, 39
Nicholas & Co. v. *United States*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 17
Nicholas & Co. v. *United States*, 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd*, 249 U.S. 34 (1919) 11, 17
Shapiro v. *United States*, 335 U.S. 1 (1947) 19
United States v. *Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971) 11, 28, 29, 30
United States v. *Passavant*, 169 U.S. 16 (1898) ..14, 15, 39
Wessels & Bro. v. *United States*, 6 Treas. Dec. 319, T.D. 24355 (Bd. Gen. App. 1903) 11, 15, 16
Woods v. *Interstate Realty Co.*, 337 U.S. 535 (1949) .. 15

STATUTES:

Antidumping Act of 1921
Section 203 [19 U.S.C. § 162 (1970) (amended 1975)] 24

Page

Tariff Act of 1897, 30 Stat. 151
Section 5 9

Tariff Act of 1909, 36 Stat. 11
Section 6 16

Tariff Act of 1913, 38 Stat. 114
Section IV, paragraph E 16

Tariff Act of 1922, 42 Stat. 858
Section 303 19

Tariff Act of 1930, 46 Stat. 590
Section 303 [19 U.S.C. § 1303 (Supp. V 1975)] . 2, 3, 4, 5, 9, 19, 20, 22, 24, 26, 33, 34, 35, 36, 37

Section 516 [19 U.S.C. § 1516 (Supp. V 1975)] . 3, 5, 24

Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978 (1975)
Section 331(a) 4, 19, 27

Section 331(d) 4, 27

19 U.S.C. § 2112 (Supp. V 1975) 26

28 U.S.C. § 255 (1970) 5

28 U.S.C. § 1256 (1970) 2

MISCELLANEOUS:

Analysis of Customs Simplification Act of 1950 20

118 Cong. Rec. 23883 (1972) 30

118 Cong. Rec. 29698 (1972) 30

118 Cong. Rec. 32413-16 (1972) 30

118 Cong. Rec. 37098 (1972) 32

41 Fed. Reg. 1298 (1976) 4

GATT, *Basic Instruments and Selected Documents* [BISD], 9th Supp. (1961) 38

1 GATT, *Basic Instruments and Selected Documents* [BISD] (1955) 38

General Agreement on Tariffs and Trade, 61 Stat. All (1947) 37, 38, 39, 40, 41, 42

Page

H. R. 8304, 81st Cong., 2d Sess. (1950) 20, 21
H. R. 1535, 82d Cong., 1st Sess. (1951) 21
H. R. 5505, 82d Cong., 1st Sess. (1951) 21
H. R. 15794, 92d Cong., 2d Sess., 118 Cong. Rec. 23484 (1972) 29
H. R. 6767, 93d Cong., 1st Sess. (1973) 26, 28, 32
H. R. 10710, 93d Cong., 1st Sess. (1973) 32
H. R. Rep. No. 92-1583, 92d Cong., 2d Sess. (1972) 31
H. R. Rep. No. 92-571, 93d Cong., 1st Sess. (1973) . 25, 32, 33
Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means, 90th Cong., 2d Sess. (1968) 22
Hearings on H. R. 5505 Before the Senate Comm. on Finance, 82d Cong., 2d Sess. (1952) 21
Hearings on H. R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. (1973) 28
Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance, 92d Cong., 1st Sess. (1971) 22, 23, 41, 42
House Comm. on Ways and Means, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973*, 93 Cong., 1st Sess. (1973) 24
Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law and Pol. Int'l Bus. 327 (1975) 39
Note, 4 Law & Pol. Int'l Bus. 146 (1972) 29
Note, 12 Va. J. Int'l L. 277 (1972) 29
31 Op. Att'y Gen. 545 (1910) 12
Protocol of Provisional Application of the General Agreement on Tariffs on Trade, 61 Stat. A2051 (1947) 38

Page

S. 3964, 92d Cong., 2d Sess., 118 Cong. Rec. 29695 (1972) 29
S. Rep. No. 92-1221, 92d Cong., 2d Sess. (1972) .. 30, 31, 32
S. Rep. No. 92-1298, 92d Cong., 2d Sess. (1972) 31
S. Rep. No. 93-1298 93d Cong., 2d Sess. (1974) .. 25, 26, 27, 28, 32, 34, 35
Staff of Senate Comm. on Finance, *Staff Analysis of Certain Issues Raised by the General Agreement on Tariffs and Trade*, 91st Cong., 2d Sess. (1970) 42
Sturm, *A Manual of Customs Law* (1974) 11
4 Weekly Comp. Pres. Docs. 25 (1968) 40

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Customs Court (C.D. 4691) and the concurring opinions are reported at 430 F. Supp. 242, 78 Cust. Ct. 59, and Customs Bulletin and Decisions of May 11, 1977, page 44. These opinions are reproduced in Appendix A to the petition for certiorari (App. A to pet.), pages 1a-50a. The judgment of the Customs Court is reproduced in Appendix B to the petition for certiorari (App. B to pet.), pages 53a-54a.

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1195) and the dissenting opinion are reported at 562 F.2d 1209, 64 C.C.P.A. ——, and Customs Bulletin and Decisions of August 17, 1977, page 6. These opinions are reproduced in Appendix C to the petition for certiorari (App. C to pet.), pages 57a-112a.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on July 28, 1977. A petition for certiorari was filed on October 11, 1977, and was granted on February 21, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1256 (1970).

STATUTES INVOLVED

Section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303 (Supp. V 1975); *see* Appendix to this Brief (App. to brief) for full text, pages 4a-9a):

"§ 1303. Countervailing duties.

"(a) Levy of countervailing duties.

"(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has

been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

Section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d) (Supp. V 1975); *see* App. to brief for text, pages 12a-13a).

QUESTIONS PRESENTED

1. Whether a bounty or grant within the purview of section 303 of the Tariff Act of 1930, as amended, is paid or bestowed when the Japanese Commodity Tax, which is imposed upon certain consumer electronic products sold in Japan, is not imposed upon such products exported to the United States.

2. Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303.

STATEMENT

Background

On April 3, 1970, petitioner, a domestic manufacturer of various consumer electronic products, filed with the Commissioner of Customs a petition under section 303 of the Tariff Act of 1930, seeking the assessment of countervailing duties on certain consumer electronic products from Japan since such products (in addition

to being bountied by other means) are exempt from a so-called "commodity tax" when exported. App. 8, 30, 139, 145-147.[1] The petition was met with inordinate delay by the Treasury Department and, in fact, it was not until Congress "forced" the Department to act that a final determination was issued on January 7, 1976.[2] 41 Fed. Reg. 1298 [App. 24-25]. Treasury then determined that "no bounty or grant is being paid or bestowed, directly or indirectly, within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), upon the manufacturer [*sic*], production, or exportation of certain consumer electronic products from Japan." App. 25. No reason was given why the forgiveness of the commodity tax on exportation did not constitute a bounty or grant.

[1] The essential facts regarding the commodity tax are not in dispute. The relevant Japanese law, the Commodity Tax Law, Law No. 48 of 1962, imposes a single-stage commodity tax upon a manufacturer's shipment of specified electronic (and other) products for consumption in Japan. The same products are exempt from the tax when shipped for export. A tax paid on a shipment for home consumption is refunded if that shipment is later exported. App. 12-14, 30-31.

The Court of Customs and Patent Appeals said in its opinion below: "We employ 'remission' to denote both tax exemption and tax refund, which are legally indistinct on this appeal." App. C to pet., page 58a n. 4. We make the same usage in this brief.

[2] On January 3, 1975, Congress enacted the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975). Section 331(a) of the Trade Act amended the countervailing duty statute, by, among other things, requiring the Secretary of the Treasury to make a final determination as to whether or not any bounty or grant is being paid or bestowed within twelve months from the date on which a petition is filed. Section 331(d) of the Trade Act provided, in effect, that with respect to investigations in progress on the date of enactment of the Trade Act, a final determination would have to be made within twelve months of the day following the date of enactment.

Decision of the Customs Court

Pursuant to the recently enacted subsection (d) of section 516 of the Tariff Act of 1930 (19 U.S.C. § 1516 (d) (Supp. V 1975)), petitioner commenced suit in the Customs Court to challenge the negative determination of the Secretary of the Treasury.

After issue was joined,[3] each side moved for summary judgment. Petitioner contended that, as a matter of law, the forgiveness of the commodity tax on the exportation from Japan of the subject electronic products constitutes the direct or indirect payment or bestowal of a bounty or grant cognizable under section 303. The Government, on the other hand, contended that, as a matter of law, the tax forgiveness on exportation does not constitute a bounty or grant. Further, upon application by the Government, a three-judge panel was convened pursuant to 28 U.S.C. § 255 (1970).

The Customs Court rendered its decision and judgment on April 12, 1977, in favor of petitioner. Relying significantly upon *Downs* v. *United States*, 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919), the Court (per Richardson, *J.*, Newman, *J.*, and Boe, *J.*) unanimously held that the forgiveness of the Japanese commodity tax on exportation constituted the conferral of a bounty or grant under section 303, as a matter of law. Each of the three judges wrote a separate opinion. App. A to pet., pages 1a-16a; 16a-38a; 38a-50a.

[3] In its complaint, petitioner contested the negative countervailing duty determination with respect to the following products: television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes. App. 12.

In its order (judgment), the Customs Court directed the Secretary of the Treasury "to ascertain and determine or estimate the net amounts of the bounty or grant paid or bestowed on the exportation of the subject electronic products from Japan and to order the appropriate customs officers throughout the United States to assess countervailing duties, in said net amounts equal to the said bounty or grant, on the subject electronic products exported from Japan, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this Order." App. B to pet., page 53a.

Decision of the Court of Customs and Patent Appeals

On April 15, 1977, the Government filed a timely appeal with the Court of Customs and Patent Appeals. App. 152-154. On July 28, 1977, that Court, in a 3-to-2 decision, reversed the decision and judgment of the three-judge Customs Court. Writing for the majority, Chief Judge Markey indicated that the language in *Downs* relied upon by the Customs Court was *dicta* and did not have to be followed, that the Treasury Department had a long-established practice of not countervailing "nonexcessive" tax remissions, that Congress acquiesced in this practice, and that the Secretary of the Treasury had "presumably determined" that the economic result of the tax remission is not a countervailable benefit. App. C to pet., pages 57a-84a. The Court directed that summary judgment be entered for the Government.[4] Judge Miller, writing

[4] In addition to arguing that the tax remission was not a bounty or grant, the Government contended on appeal that the Customs Court should not have ordered the assessment of countervailing duties on imports entered or withdrawn from warehouse for consumption before the publication of that Court's decision in the Customs Bulletin (May 11, 1977). The Court of Customs and Patent Appeals did not reach this issue. *See* App. C to pet., page 59a n. 8.

for himself and Judge Baldwin in dissent, observed that the key language of *Downs* was not *dicta* but was basic to this Court's decision, that *Downs* prevails over any administrative practice, that Congressional acquiescence in such practice is a myth, and that the controlling question is a matter of law and not a factual inquiry into economic result. App. C to pet., pages 84a-112a.

SUMMARY OF ARGUMENT

It has been held by this Court in *Downs,* in 1903, and reaffirmed in *Nicholas,* in 1919, that the remission of a tax upon the exportation of articles which are subjected to tax when sold or consumed in the country of their production is a bounty or grant within the purview of our countervailing duty law. The statute construed in *Downs* has been repeatedly reenacted without significant change, thereby demonstrating a Congressional ratification of this Court's construction. Thus, it follows that remission of the Japanese commodity tax on the exportation of the subject consumer electronic products is a bounty or grant and must be countervailed with offsetting duties.

That the Treasury Department has developed a practice of not countervailing "nonexcessive" remissions of indirect tax on exportation is without moment, being in conflict with rulings of this Court. Further, contrary to the conclusion reached by the Court below, Congress did not acquiesce in the Treasury Department's prac-

tice. In 1950, when, for the first time, the practice was brought to Congress' attention, Congress refused to comply with the Treasury Department's request to amend the statute and codify the practice, after having been advised of the possible conflict between the practice and judicial rulings. By the time of the enactment of the Trade Act of 1974, in 1975, Congress had become aware of numerous deficiencies in the manner in which the Treasury Department administered the countervailing duty law, including the continuing failure to follow this Court's rulings regarding tax remission. Congress responded to this situation by refusing to express ratification of the Treasury's practice, by placing strict limitations on the discretion exercisable by the Secretary of the Treasury, and by greatly enhancing the rights and remedies of American manufacturers under the countervailing duty law in order to assure the effective protection that that clear and mandatory law was intended to provide.

Finally, it was erroneous for the Court below to have failed to appreciate that the controlling question is a matter of law and not a factual inquiry into "economic result" of the commodity tax remission. The Court compounded its error by having based summary judgment on presumed facts, *viz.*, that the Secretary of the Treasury made a determination that the economic result of the Japanese tax remission is not the conferring of a countervailable benefit. Not only was this reliance on presumption improper on procedural grounds, but clearly that which was presumed did not occur. On the contrary, the Secretary of the Treasury and other officers of the Executive Branch have long recognized the export subsidy and trade distortive effects of indirect tax remissions on exportation.

ARGUMENT

I. This Court Has Ruled That the Remission of a Tax on Products Exported to the United States When Such Products Are Subject to Tax in Their Country of Production Constitutes a Bounty or Grant Under the Countervailing Duty Law, and This Ruling Has Been Ratified by Congress.

Section 303 of the Tariff Act of 1930, as amended, provides in pertinent part:

> "(a) Levy of Countervailing Duties.—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed."

This language has remained substantially unchanged since the first countervailing duty statute of general application was enacted in 1897.[5] The law has been twice construed by this Court: in 1903 (*Downs, supra*)

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[5] Tariff Act of 1897, § 5, 30 Stat. 151, 205. For text of statute, *see* App. to brief, page 1a.

and in 1919 (*Nicholas, supra*). In each case, this Court taught, generally, that the scope of the statute was extremely broad and, specifically, that the remission of taxes by foreign countries upon the exportation of articles which are subjected to a tax when sold or consumed in the country of production constitutes the conferral of a bounty or grant within the contemplation of the statute.

The *Downs* case, as correctly summarized by Judge Richardson, speaking for the Customs Court,

> "involved an elaborate scheme of the Russian Government to control the production and price of sugar. Exporters of sugar were relieved of the ordinary excise tax which would have been payable had the sugar been sold domestically, and additionally, they received marketable certificates of value for their exports. These certificates could be sold to other sugar producers who would then be free to have their surplus sugar reclassified as free sugar and sold in the domestic market without the prohibitive tax burden that would otherwise have accompanied the sale of surplus. The Supreme Court, addressing itself to this scheme stated (p. 515):
>
> 'The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, viz.: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation'." [App. A. to pet., page 6a.]

The majority of the Court of Customs and Patent Appeals considered the foregoing quotation from *Downs* as *dicta,* and stated that this Court really held that the tax remission in conjunction with the other features of the Russian scheme bestowed a bounty. App. C to pet., pages 60a-66a. We respectfully disagree. We submit that the three-judge majority of the Court of Customs and Patent Appeals engaged in an absolutely impermissible reading of this Court's opinion, which reading conflicted not only with the plain meaning of what this Court said but with readings given to the *Downs* opinion by a veritable host of authorities.[6]

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[6] General Appraiser Somerville, speaking for the Board of General Appraisers (predecessor to the Customs Court), in *Wessels & Bro.* v. *United States,* 6 Treas. Dec. 319, 320-321, T.D. 24355 (Bd. Gen. App. 1903); General Appraiser Somerville, speaking for the Board of General Appraisers in *F. W. Meyers & Co.* v. *United States,* 6 Treas. Dec. 260, 265, T.D. 24306 (Bd. Gen. App. 1903); Attorney General Wickersham, in 31 Op. Att'y Gen. 545, 556 (1910); General Appraiser Hay, speaking for the Board of General Appraisers in *Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, 63-65, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919); Mr. Justice McKenna, speaking for this Court, in *Nicholas & Co.* v. *United States,* 249 U.S. 34, 41 (1919); Assistant Attorney General Hanson in the Government's brief before this Court, in *Nicholas, supra,* at 38; Judge Maletz, speaking for himself and Judges Watson and Re (now Chief Judge), of the Customs Court in *Hammond Lead Products, Inc.* v. *United States,* 306 F.Supp. 460, 465-467, 468 (Cust. Ct. 1969), *reversed on jurisdictional grounds,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Almond, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024, 1035 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971); Judge Richardson, speaking for himself and Judge Landis, of the Customs Court in *American Express Company* v. *United States,* 332 F. Supp. 191, 197-200 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973); Sturm, *A Manual*

As Judge Miller correctly observed in his dissenting opinion (*see* App. C to pet., pages 91a-95a), this Court regarded the remission of excise taxes upon exportation as a bounty or grant and the conferral of certificates to exporters as an *additional* bounty or grant. The Board of General Appraisers, whose opinion had been adopted by the Fourth Circuit, concluded that bounties or grants had been bestowed for two separate reasons: (1) the remission of tax and (2) the issuance of the certificates. *Downs* v. *United States,* 4 Treas. Dec. 405, T.D. 22984 (Bd. Gen. App. 1901), *aff'd;* unpublished (C.C. Md. 1901), *aff'd,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). In his brief before this Court, Downs advised that the grounds of the decision of the Circuit Court of Appeals were twofold, *viz.*:

> "FIRST.—That the remission of the excise tax, upon the exportation of the sugar, was a bounty or grant within the scope of Section Five.
>
> "SECOND.—That the issuance to the exporter of a certificate which had a substantial market value operated as a bounty or grant upon exportation." [Downs' brief, 5.]

Downs argued that *neither* constituted the conferral of a bounty or grant on exportation; the Government joined issue on both points; and this Court resolved the issues presented to it.

Downs expressly addressed himself to the tax remission issue in Point Five of his argument, entitled,

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of Customs Law 415-417 (1974); Judges Richardson, Newman, and Boe of the Customs Court and Judge Miller, speaking for himself and Judge Baldwin, of the Court of Customs and Patent Appeals in dissent, in this case.

"The remission of excise taxes on the exportation of sugar is not a bounty or grant on exportation as the terms are used in Section five." [Downs' brief, 43 *et seq.*] Among other things, Downs argued (*id.* at 45):

> "To maintain that a drawback is a bounty is equivalent to saying that an omission to tax is a bounty. The fact that goods are exported free from tax does not make them bounty-fed as regards the foreign market. On the contrary unless the excise tax be remitted on export *it becomes an export duty when the goods are sold abroad.*" [Emphasis in original.]

The Government stated in response (brief, 23-24, 25):

> ". . . [I]f a foreign government should object to our drawbacks or remission of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive *legal* ground for resisting simply because it was an ordinary tax remission or drawback in our own municipal system. . . .
>
> * * * *
>
> ". . . For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty." [Emphasis in original.]

In resolving the issues raised by the parties, this Court considered both the remission of excise taxes upon exportation and the issuance of certificates to

exporters.' As noted by Judge Miller (App. C to pet., pages 91a-92a), the basis of the Court's decision "rested on its interpretation of the key statutory language, particularly the term 'bounty'." Thus, the Court explained (187 U.S. at 502):

> "A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1895, allowing a bounty upon the production of sugar, and Rev. Stat. §§ 3015-3027 [U.S. Comp. Stat. 1901, pp. 1989-1994], allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant*, 169 U.S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219."[8]

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[7] The amount of bounty or grant was not in dispute. *See Downs, supra*, 4 Treas. Dec. at 406; *Downs* v. *United States*, 113 F. 144, 146 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903).

[8] The opinion in *United States* v. *Passavant*, 169 U.S. 16 (1898), was relied upon by this Court in both landmark countervailing duty cases, *Downs* and *Nicholas*. Although *Passavant* did not involve countervailing duties, it did involve a German tax remission scheme (concerning cotton velvets) similar to that existing under the subject Japanese Commodity Tax Law. The question before the Court was whether the price in the home market, which included a tax, or the price for export, which did not include such tax (since the tax was forgiven on exportation) constituted the dutiable value, *i.e.*, the statutory "actual market value or wholesale price."

The Court chose the former. It found that the actual market value was the price charged in the home market. It viewed the export price as essentially a contrived price, stating (169 U.S. at 22): "Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback." Elsewhere, in its opinion, the Court described this remission of tax as "a special advantage extended by the government in aid of manufacturers and trade." *Id.* at 23.

The Court proceeded to apply this interpretation to the Russian Government's remission of excise taxes on exportation, in the language quoted by Judge Richardson, *supra*, to wit:

> "The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. . . . When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation." [187 U.S. at 515.]

That the Court *also* found the issuance of the certificates to constitute an export bounty, 187 U.S. at 516, certainly does not relegate its clear and forcefully stated rule on tax remission to *dictum* or to something less than *ratio decidendi*.[9] *See, e.g., Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948).

Indeed, it is interesting to note that in *Wessels & Bro.* v. *United States*, 6 Treas. Dec. 319, T.D. 24355

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[9] Further, the Court's earlier interpretation of the term "bounty" as including remission of tax, being basic to its conclusion, cannot be regarded as *dictum* either. *See Eisner* v. *Macomber*, 252 U.S. 189, 204-205 (1920).

(Bd. Gen. App. 1903), two months after this Court's *Downs* decision, the Board of General Appraisers rendered a decision in a case presenting the identical issue involved in *Downs*. Speaking for the Board, General Appraiser Somerville, *who had written the Board's opinion in Downs,* described the *Downs* case as follows (6 Treas. Dec. at 320):

> "The question thus presented is identical with that discussed in Downs' case, G.A. 4912 (T.D. 22984), decided April 19, 1901, in which we held as follows: * * * that the Russian Government pays or bestows a bounty or grant upon the exportation of so-called 'free sugar' so as to work a benefit or advantage to the exporter *in two ways* (a), by remitting or refunding the excise tax due upon the sugar, and (b) by issuing to the exporter a certificate of exportation, carrying with it a privilege of exemption from taxation, which certificate is transferable and has a substantial market value." [Emphasis added.]

General Appraiser Somerville then proceeded to demonstrate his understanding that this Court in *Downs,* had reached the same conclusions as the Board. *Id.* at 320-321.

After *Downs* (and *Wessels* and *Meyers* [10]), Congress reenacted the countervailing duty statute in 1909 and 1913.[11] It was the 1913 law that was construed by this Court in the *Nicholas* case, in 1919. The principal issue

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[10] *See* n. 6, *supra.*

[11] Tariff Act of 1909, § 6, 36 Stat. 11, 85; Tariff Act of 1913, § IV, paragraph E, 38 Stat. 114, 193. The 1909 statute extended the Act's coverage to export bounties or grants paid or bestowed by any "province or other political subdivision of government." The 1913 version was identical to the 1909 version.

in *Nicholas* was whether a payment made for the purpose of compensating exporters for certain expenses incurred could be properly construed as a bounty or grant, as the Secretary of the Treasury had determined. In that case, the British Government, in addition to relieving exporters of spirits of the burden of certain excise taxes, which would have been collected had the spirits been sold for domestic consumption, made an allowance to exporters of 3 pence or 5 pence per gallon, depending on the spirits exported. Relying heavily on the *Downs* opinions, the Board of General Appraisers found the allowance to constitute a bounty or grant. *Nicholas & Co.* v. *United States,* 29 Treas. Dec. 59, T.D. 35595 (Bd. Gen. App. 1915), *aff'd,* 7 Ct. Cust. Appls. 97, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919). While the Board, at the conclusion of its opinion, stated that the issue of whether the remission of the ordinary excise tax constituted an export bounty was not before it and need not be decided, the Board clearly inferred that it held the view that such remission constituted the payment of a bounty. 29 Treas. Dec. at 65; *see also id.* at 63, 64 (citing and relying on *Downs*).

The Court of Customs Appeals, in affirming, also noted that the status of the tax remission was not put in dispute, but, nonetheless, in holding that the allowance was an export bounty, relied significantly on *Downs. Nicholas & Co.* v. *United States,* 7 Ct. Cust. Appls. 97, 104, T.D. 36426 (1916), *aff'd,* 249 U.S. 34 (1919). When the case reached this Court, petitioners attempted to subvert the *Downs* ruling by arguing that this Court did not hold that the remission of an excise tax on exported sugar constituted a bounty, but rather that the value of the certificates constituted a bounty. Petitioners' brief, 45-46.

Interestingly, the Government, after expressing considerable reliance upon and quoting extensively from this Court's *Downs* opinion, responded as follows (brief, 38):

> "The Russian bounty case was summed up in a single sentence in the opinion (187 U.S. 515):
>
> > 'When a tax is imposed on all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation'." [12]

In affirming the decision of the Court of Customs Appeals, this Court not only gave the countervailing duty statute a broad reading,[13] but it supported its

[12] Immediately following, the Government argued (quoting from this Court's *Downs* opinion) (brief, 38-39):

> "The British allowance is paid directly to exporters upon their exportation of potable spirits. The allowance 'by creating a foreign demand, stimulates an increased production to the extent of such demand.' The allowance 'opens to the manufacturer a foreign market for his merchandise produced in excess of the demand at home.'
>
> "The controlling factor is the effect or result of the operation of the foreign law. Neither the name ascribed by the foreign government to the payment nor the method of payment is controlling."

[13] For example, this Court stated (249 U.S. at 39):

> "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

Further, this Court explained that a situation where goods could be sold cheaper in the United States than in the place of their production as a result of an act of Government because their destination was a foreign market was one which the statute intended to cover. *Ibid.*

conclusion by referring to the example of indirect bounty given in its *Downs* opinion, *i.e.*, "the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production." 249 U.S. at 41. Thus, in *Nicholas*, the *Downs* teaching was reaffirmed by this Court and the statute was again reenacted, with changes not here relevant, in 1922, 1930, and 1975.[14]

In brief, this Court has held that the remission of tax upon exportation is a bounty or grant within the countervailing duty law. By reenactment of the statute after *Downs* (and *Nicholas*), Congress has ratified such construction. *See, e.g., Shapiro* v. *United States*, 335 U.S. 1, 16 (1947); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). The majority of the Court below simply chose to read out of the body of our law the only decisions of this Court ever rendered on the subject, and, in doing so, reached the incorrect conclusion that the remission of the Japanese commodity tax on exportation is not a bounty or grant.

II. Congress Did Not Acquiesce in Any Treasury Department Practice to Countervail "Excessive" Tax Remissions Only.

After having incorrectly dismissed this Court's specific holding regarding tax remissions and after having ignored this Court's teachings regarding the meaning and scope of "bounty or grant", the majority below

[14] Tariff Act of 1922, § 303, 42 Stat. 858, 935; Tariff Act of 1930, § 303, 46 Stat. 590, 687; Trade Act of 1974, § 331(a), 88 Stat. 1978, 2049 (1975), amending section 303 of the Tariff Act of 1930. [In 1922, the statute's coverage was broadened to include bounties or grants on manufacture or production, and paid or bestowed by private entities.]

proceeded to conclude that Congress acquiesced in the Treasury Department's administrative practice of countervailing only "excessive" remissions of tax on export—"*i.e.*, the governmental giving of something above and beyond mere excise tax remission." App. C to pet., page 74a. However, any such acquiescence, as the dissent demonstrated, is a myth.

According to the record, the first specific notice to Congress (of the administrative practice) came in 1950 (rather than 1949, as stated by the Court below, App. C to pet., page 77a), when the Treasury Department sought specific legislation which would have legitimatized the practice. H.R. 8304, 81st Cong., 2d Sess., § 2 (1950).[15]

The purpose of the proposed amendment was expressed in the Department's analysis which reported the following (*Analysis of Customs Simplification Act of 1950*, 5):

> "* * * Subsection (c) would also add a provision that countervailing duty shall not be levied because of the ordinary remission or refund of taxes and duties allowed on exportation by most nations, including the United States. Under the existing administrative interpretation of section 303 of the Tariff Act, countervailing duty is not imposed in such situations, but some judicial comments on the statutes do not make it clear that the courts would consider such duty or tax exemptions as outside the scope of the countervailing duty provision. The proposed amendment eliminates the possibility of rulings in conflict with the administrative practice which has been followed for over 50 years."

[15] Section 2 of the bill provided that section 303 of the Tariff Act of 1930 would be amended by the addition of the following language: "* * * The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section."

Congress rejected the proposal.[16]

Remarkably, the Court below found that this refusal to amend the law indicated approval of the administrative practice, or at least "a then-current willingness to allow that administrative practice to continue unabated and unchanged." App. C. to pet., page 78a. We respectfully submit that the contrary should have been inferred. As Judge Newman correctly observed (App. A to pet., page 26a):

> "It is apparent, then, that Congress could have, but declined to, nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law."

[16] H. R. 8304 was replaced by H. R. 1535, 82d Cong., 1st Sess. (1951), which in turn was supplanted by H. R. 5505, 82d Cong., 1st Sess. (1951). At Senate Finance Committee hearings on H. R. 5505, Senator O'Mahoney spoke against the proposal, identifying it as an "attempt by law to reverse the present rule." *Hearings on H. R. 5505 Before the Senate Comm. on Finance*, 82d Cong., 2d Sess. 266 (1952). He proceeded to say (*ibid*):

> "I have not had the opportunity to examine all of the cases, but I have been given to understand, and I understand, that the courts have, without variation, held that such an exemption or such a refunding is a bounty or grant. So here we have an explicit request to reverse that rule."

H. R. 5505 was not reported out of the Finance Committee.

The majority below also looked to events of (February) 1968—testimony before the Senate Finance Committee advising of Treasury's practice to consider section 303 inapplicable to "nonexcessive" remissions of excise taxes—and reasoned that Congress' failure to take legislative action afterwards was further evidence of acquiescence. However, Congress did take action. *See* dissent, App. C to pet., pages 105a-106a. Further, in June 1968, the Ways and Means Committee of the House of Representatives received testimony from domestic steel industry spokesmen that notwithstanding the Treasury Department's refusal to apply countervailing duties to offset remissions of indirect taxes on exports, in disregard of decisions of this Court, the countervailing duty law does not have to be amended—just followed. *See Hearings on Foreign Trade and Tariff Proposals Before the House Comm. on Ways and Means,* 90th Cong., 2d Sess. 2211-28, *esp.* 2225-26 (1968).

Indeed, in May 1971, Joseph S. Wright, then Chairman of the Board of the petitioner, made similar remarks before the Súbcommittee on International Trade of the Senate Finance Committee.[17] In his written statement submitted on May 17, 1971, petitioner's Mr. Wright advised the Subcommittee of Japanese subsidy practices, of the pendency of petitioner's countervailing duty petition (then over a year old), of the Treasury Department's reluctance to be guided by decisions of this Court, and of the consequent need for new legislation, *not amending the substance of the countervailing duty law but providing for time limits and judicial review. Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 109, 110-111 (1971). [The written statement, as reprinted in *Hearings on World Trade and Investment Issues, supra,* at 104-118, appears at App. 52-77.] Mr. Wright's remarks were well received by the Subcommittee Chairman, Senator Ribicoff. *Hearings on World Trade and Investment Issues, supra,* at 102. In 1975, when the relevant statutes were amended by the Trade Act of 1974, the very recommendations made by petitioner's Chairman were put into place.[18] *See* 19 U.S.C. §§ 1303(a)(4) and 1516 (Supp. V 1975).

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[17] The Subcommittee had just been formed. In the Senate Finance Committee's press release of March 31, 1971, announcing the formation of the Subcommittee, the Committee Chairman, Senator Long, stated, "I would hope that the Subcommittee's inquiry will include an examination of nontariff barriers, and other matters, such as . . . [t]he border tax-export rebate system of the EEC, and the reasons why indirect tax rebates on exports are not considered 'bounties or grants' within the meaning of the countervailing duty statute as interpreted by Supreme Court cases." *Hearings on World Trade and Investment Issues Before the Subcomm. on International Trade of the Senate Comm. on Finance,* 92d Cong., 1st Sess. 7, 11 (1971). Shortly thereafter, on May 14, 1971, the Committee staff submitted a paper entitled *Foreign Trade—A Survey of Current Issues to be Studied by the Subcommittee on International Trade of the Committee on Finance, United States Senate,* reprinted in *Hearings on World Trade and Investment Issues, supra,* at 887, in which the following was stated (*id.* at 902):

> "The countervailing duty law was written to offset the subsidy effect on such devices as the European rebate of indirect taxes on exports. Yet, the law has not been applied in this area even though couched in mandatory terms. A case has been pending on this issue for over two years before the Treasury Department, which appears unwilling to make a decision. If the laws are not adequate or too harsh they should be changed, rather than left as 'dead letters' on the statute books."

[18] Inasmuch as footnote 26 of the majority's opinion below suggests otherwise, it is erroneous. App. C. to pet., page 79a.

Furthermore, when Congress considered what was to become the Trade Act of 1974, Treasury's "practice" under section 303 of applying a "directly related" test to tax remissions was brought to Congress' attention. The Executive Branch proposed an amendment to section 203 of the Antidumping Act of 1921, 19 U.S.C § 162 (1970) (amended 1975), and explained its purpose as follows (House Comm. on Ways and Means, *Press Release and Other Material Relating to the Administration Proposal Entitled the "Trade Reform Act of 1973" Transmitted to the Congress on April 10, 1973,* 93d Cong., 1st Sess. 89-90 (1973)):

> "The second amendment deals with the treatment of certain types of tax rebates in computing purchase price. The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. With the amendment, no adjustment to the advantage of the foreign exporter would be permitted for indirect tax rebates unless the direct relationship of the tax to the product being exported, or components thereof, could be demonstrated.
>
> "The Treasury Department considers rebates or remissions of taxes not directly related to an exported product or its components as being bounties or grants within the meaning of the countervailing duty law. Under the Antidumping Act, Treasury is required in its calculation of purchase price to add back to the price at which merchandise is sold to the United States 'the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, *in respect to the manufacture, production, or sale of the merchandise,* which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.'

> (Emphasis added [by author of press release].) The 'adding back' of such taxes under the Antidumping Act would have the effect of reducing or eliminating any dumping margins that may exist. The language of the Antidumping Act 'in respect to the manufacture, production or sale of the merchandise' is somewhat broader than the standard applied to tax rebates under the countervailing duty law (directly related to the exported products or its components) and could result in inconsistency of treatment of tax rebates under the two laws."

Although Congress eventually adopted the proposed amendment (with some modification) the House Ways and Means Committee took pains to point out the following (*H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973)):

> "The amendment would conform the standard in the Antidumping Act to the standard under the countervailing duty law, thereby harmonizing tax treatment under the two statutes. However, your committee, in recommending this amendment, does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes."

The Senate Finance Committee made a similar statement (*S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974)):

> "The standard in the proposed amendment parallels that standard employed by the Treasury Department under the countervailing duty law in determining whether tax rebates and remissions constitute bounties or grants. However the Committee, in recommending this amendment, does not express approval or disapproval of that Treasury practice."

Thus, the key committee of each chamber of the Congress explicitly stated that it was not ratifying Treasury's practice.

Nevertheless, the Court below viewed the Congressional failure to provide specifically for the assessment of countervailing duties to offset "nonexcessive" indirect tax remissions on exports as evidence of acquiescence in the Treasury Department's practice. We respectfully submit that this view is unsustainable. Congress did not wish to address itself to *specific* subsidy practices in the Trade Act, but instead expressed the wish "that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties." 19 U.S.C. §1303 (d)(1) (Supp. V 1975). *See also* 19 U.S.C. §2112 (Supp. V 1975). To assist the Executive Branch in its negotiating efforts, Congress even gave *limited* discretionary authority [not invoked herein] to the Secretary of the Treasury not to countervail bounties or grants, under certain well-defined circumstances and subject to close Congressional review. 19 U.S.C. §1303 (d)(2) and (3) (Supp. V 1975).

However, by giving the Executive Branch the power to negotiate, Congress was not diluting the substantive law nor giving the Executive Branch carte blanche to ignore the mandate of the law. *See S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 187 (1974). Indeed, the Trade Act that was eventually passed in 1975 differed markedly from the bill which the Executive Branch proposed in 1973. In the initial bill, H. R. 6767, 93d Cong., 1st Sess. §330 (1973), there was no *effective* provision for a

time limit for Treasury Department action (*see S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 183-184 (1974)); there was *no* provision for judicial review of negative countervailing duty determinations by American manufacturers; there *was* a provision giving the Secretary of the Treasury a broad discretion to refrain from ordering the assessment of countervailing duties under certain circumstances. Also, as noted, with respect to the amendment of the Antidumping Act, an effort was made by the Executive Branch to have Congress ratify Treasury's tax remission practice under the countervailing duty law. However, not only did Congress clearly say that it would not ratify the practice, but it greatly enhanced the rights and remedies of American manufacturers in countervailing duty proceedings and it greatly limited the discretion which the Treasury Department sought for itself. These developments, as we shall now show, are all clearly inconsistent with the conclusions of the Court below that there had been legislative acquiescence in the Treasury Department's practice and that Congress had conferred upon the Secretary of the Treasury a broad discretion to determine which actions or programs of foreign governments should be countervailed. *See* App. C to pet., pages 68a, 71a, 82a.

A. Time Limits. With respect to time limits, Congress required Treasury to reach a final determination within one year from the filing of a petition and, furthermore, it deemed all petitions pending at the time of enactment to have been filed on the day after the date of enactment. Sections 331(a) and 331(d), Trade Act of 1974. By taking this action, Congress wished to prevent the Treasury Department from pursuing

past practice "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974).[19]

B. Judicial Review. By providing for judicial review, Congress wished "to assure effective protection under the countervailing duty laws to American producers." *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 185 (1974). This provision for review was enacted over the Treasury Department's objection,[20] and in direct response to a 3-2 decision of the Court of Customs and Patent Appeals in which it was determined that Congress had not wished to give American producers a judicial remedy in countervailing duty cases because of the thorny international problems that could result if the Secretary of the Treasury were compelled to countervail against his will. *United States* v. *Hammond Lead Products, Inc.,* 440 F.2d 1024 (C.C.P.A.), *cert. denied,* 404 U.S. 1005 (1971). That Court had concluded that the Congress elected "to rely on executive discretion to avoid making the United States ridiculous by penalizing imports from foreign countries which have

[19] During the Ways and Means Committee hearings on H. R. 6767, the Congress had been advised of the unconscionable sluggishness with which the Treasury Department was handling petitioner's countervailing duty complaint. *See Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess. 3292-3293 (1973).

[20] *See Hearings on H.R. 6767 Before the House Comm. on Ways and Means,* 93d Cong., 1st Sess. 254 (testimony of Hon. George P. Shultz, then Secretary of the Treasury) (1973).

taken reasonable action, action our own Government takes or counsels." *Id.* at 1031.[21]

The Congressional response was swift and incisive. Congress was disturbed not only because of the denial to the American manufacturer of his day in court, but because of the judicial construction that Congress had conferred discretion on the Secretary, when in fact the countervailing duty law had been written in mandatory terms. On June 29, 1972, and September 7, 1972, bills were introduced in the House and Senate respectively to provide for judicial review by American manufacturers of negative countervailing duty determinations. H. R. 15794, 92d Cong., 2d Sess., 118 Cong. Rec. 23484 (1972); S. 3964, 92d Cong., 2d Sess., 118 Cong. Rec. 29695 (1972). In support of the House bill which he introduced, Congressman Fulton made it clear that he wished to overrule *Hammond Lead* and stated:

> "The effect of that case is to emasculate the countervailing duty law which is designed to offset the artificial competitive advantage of imported products over American-made products by virtue

[21] The legal commentators were quick to see *Hammond Lead* as being "responsive to the political and diplomatic exigencies concomitant with the imposition of duties rather than to the interests of domestic companies." Note, 12 Va. J. Int'l L. 277, 279 (1972). *See also* Note, 4 Law & Pol. Int'l Bus. 146, 155 (1972), where the following was observed:

> "In denying Hammond Lead the opportunity to be heard on the merits, the C.C.P.A. has disregarded the congressional intent underlying section 516(b). • • • Through this narrow approach, the court has deprived American manufacturers of an invaluable means of protecting their economic interests against the onslaught of those imported goods which have been benefitted by the producing country at the cost of competitive disadvantage for the American manufacturers."

of subsidies given in the exporting country. While the countervailing duty law is mandatory in its terms, the Hammond Lead decision forecloses effective relief to injured domestic producers where Treasury decides for *policy reasons* not to enforce the law or unreasonably delays enforcement." [118 Cong. Rec. 23883 (1972) (emphasis added).]

On the Senate side, Senator Fannin also expressed the desire to overrule *Hammond Lead,* and among other things, stated:

"[In view of *Hammond Lead*] we are faced with a situation where an importer has the right to judicial review under the statute but a domestic manufacturer is denied his day in court.

"The amendment that is being introduced today would enable our domestic producers to begin using effectively an instrument that we have already on hand [the countervailing duty statute], one designed for the sole purpose of insuring fair competition." [118 Cong. Rec. 29698 (1972).]

On September 27, 1972, the Senate tacked onto a minor House-passed tariff bill an amendment providing the judicial review sought in the other two bills mentioned. *See* 118 Cong. Rec. 32413-16 (1972). In reporting out the amended bill, the Senate Finance Committee had made the following significant remarks (*S. Rep. No. 92-1221,* 92d Cong., 2d Sess. 8 (1972)):

"The Committee amendment providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patent Appeals (*United States* v. *Hammond Lead Products, Inc.*) holding that judicial review was not available to American producers in countervailing duty cases.

The Committee is concerned that that decision might adversely affect the ability of American producers to obtain meaningful relief against subsized [*sic*] import competition under the Countervailing Duty Law (section 303 of the Tariff Act) because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.

"In addition, importers enjoy the right to judicial review in countervailing duty cases under existing law. The Committee believes that American producers as well as importers should be permitted to have the right to judicial review in countervailing duty cases as a matter of basic equity and fairness, and *as a means to secure administration of the law in keeping with the intent of Congress reflected in the broad, explicit and mandatory terms used in section 303.*

"The Countervailing Duty Law requires the Secretary of the Treasury to assess an additional duty on imports of dutiable articles with respect to which a bounty or grant has been paid. The additional duty must be equal to the amount of the bounty or grant, thereby neutralizing the artificial advantage afforded the foreign product by virtue of the subsidy. Consequently, countervailing duties are not, nor were they ever intended to be, penal in nature: they are remedial in nature inasmuch as they operate to offset the effect of subsidies afforded foreign merchandise." [Emphasis added.]

Although the amendment was accepted by the House-Senate conferees (*H. R. Rep. No. 92-1583,* 92d Cong., 2d Sess. (1972); *S. Rep. No. 92-1298,* 92d Cong., 2d Sess. (1972)), the bill was not brought to a vote in the House as an accommodation to the Secretary of the Treasury, with the understanding that the matter would be given attention in the context of trade legis-

lation in the next Congress. *See* 118 Cong. Rec. 37098 (1972).

While the Executive Branch's trade legislation proposal of April 1973 contained no provision for judicial review of negative countervailing duty determinations, Congress provided one in the Trade Act.[22]

C. Limitation on Discretion. Finally, as noted, Congress explicitly limited the discretion of the Secretary of the Treasury. The trade bill proposed by the Executive Branch in 1973 contained a provision which would have given the Secretary the discretion to refrain from ordering the assessment of countervailing duties if he determined that the imposition of such duties would result or be likely to result in significant detriment to the economic interests of the United States. H. R. 6767, 93d Cong., 1st Sess., § 330 (1973). App. to brief, pages 22a-23a. ***This proposal was rejected by Congress.*** The House of Representatives instead passed a bill which would have authorized the Secretary of the Treasury to suspend the imposition of countervailing duties if he determined that such imposition would be likely to seriously jeopardize the satisfactory completion of contemplated international trade negotiations. H. R. 10710, 93d Cong., 1st Sess., § 331 (1973).[23] ***However,***

[22] The House Ways and Means Committee expressed views similar to those that the Senate Finance Committee expressed in *S. Rep. No. 92-1221, supra,* in 1972. *H. R. Rep. No. 93-571,* 93d Cong., 1st Sess. 76 (1973). In its 1974 report on the trade bill, the Senate Finance Committee was particularly emphatic in its discussion of the need to assure protection to United States producers against bounty-fed foreign competition. *See S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 183 (1974).

[23] The purpose of this provision was explained by the Ways and Means Committee, as follows:

> "The 4-year temporary discretionary authority was accorded because of the very real danger that the mandatory provisions of section 303, combined with the committee's amendment providing for a 12-month time limit for action under this section, could compel the Secretary to take actions which might well frustrate the successful outcome of the forthcoming negotiations. The committee is aware that there are differences of opinion internationally as to what constitute permissible and nonpermissible export assists under international law and practice, and that the negotiation of an agreement on this issue may prove difficult. The committee has no desire to sanction certain existing export-assist practices conducted by various foreign governments. It also recognizes that the United States itself may well be conducting programs of export-assists which foreign governments may find inconsistent with international law and policy.
>
> "With this background, the Secretary of the Treasury must be temporarily accorded some degree of latitude in administering section 303 until an international agreement is reached regarding the international practices which would be considered permissible and nonpermissible. Otherwise the Secretary of the Treasury may conceivably be constrained to take countervailing action under section 303 against a practice which ultimately may be internationally agreed to be a permissible international export assist. The discretionary authority accorded herein has been restricted to 4 years to facilitate the international negotiations. It has been accorded on the understanding that the U.S. negotiators will report regularly to the Congress on the progress and ultimately on the outcome of the negotiations with respect to international export assists. The committee assumes that it may be necessary to further amend section 303 depending upon the outcome of these negotiations, assuming that they terminate in an agreement acceptable to the United States." [*H.R. Rep. No. 93-571,* 93d Cong., 1st Sess. 75-76 (1973).]

even this proposed grant of limited discretion was not found acceptable to the Senate, because it failed to protect sufficiently the needs of domestic industry. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 186 (1974). The Senate replaced the House proposal with a much more limited grant of discretion to postpone countervailing duty assessments. It was the Senate version which became law. *See* section 303 (d)(2) and (e) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(d)(2) and (e) (Supp. V 1975)).

Section 303(d)(2) provides:

> "If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—
>
> "(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;
>
> "(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and
>
> "(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;
>
> the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective." [24]

[24] In its report, the Senate Finance Committee stated with respect to this provision (*S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 187 (1974)):

> "Under the Committee bill, all three conditions must be met before the Secretary could waive the application of the countervailing duty. Under the Committee amendment, this temporary discretion in the application of the countervailing duty law could not be abused during the negotiations, *since* all three conditions would have to be met before such discretion could be exercised. The Committee believes this provision would be used sparingly since foreign countries should be encouraged to eliminate the bounty or grant during the six-month period following a positive preliminary determination and before the twelve-month period for a final determination." [Emphasis in original.]

Furthermore, any exercise of the "postponement" authority is subject to immediate review and revocation by either chamber of Congress. *See* section 303(e) of the Tariff Act of 1930, as amended (19 U.S.C. § 1303(e) (Supp. V 1975)).

In this setting, it is thus clear that Congress was not expressing ratification of or acquiescing in the Treasury Department's tax remission practice but rather clearly demonstrated its intent that, until further amended and absent the three specified conditions precedent to the invocation of the discretionary authority in section 303(d)(2), the countervailing duty law be enforced on the basis of the unambiguous statutory language and the case law construing it, and that American industry be protected from subsidized import competition. *See S. Rep. No. 93-1298*, 93d Cong., 2d Sess. 33-34, 183-188 (1974).[25] The Court below, in perceiving a grant of discretion to the Secretary to

[25] As Judge Boe of the Customs Court correctly stated, "[t]o construe our recently enacted countervailing duty statute in conformity with the interpretation urged by the . . . [Government] not only would disregard the statutory intent of the Congress, but would thwart the very objective it seeks to attain through negotiation and agreement." App. A to pet., page 50a.

define countervailable bounties or grants, has grossly misread the statutory plan.[26]

III. The Secretary of the Treasury Did Not Make a Determination That the Economic Result of the Remission of the Commodity Tax Is Not the Conferring of Such a Benefit, Subsidy, or Incentive as Would Rise to the Level of a Bounty or Grant Under Section 303.

The majority of the Court of Customs and Patent Appeals did *not* decide that the forgiveness of an excise or indirect tax on exportation is not a bounty or grant as a matter of law.[27] Rather, it engaged in a *presumption* that the Secretary of the Treasury made a determination "that the economic result here is not the conferring of such a benefit, subsidy, or incentive as would rise to the level of a bounty or grant under § 303." App. C to pet., 69a.

We respectfully submit that, since the remission of the commodity tax on exportation is a bounty or grant

[26] The view of the Court below that Congress, by not having defined "bounty" or "grant", intended to provide a "wide latitude within which the Secretary . . . may determine the existence or non-existence of a bounty or grant" is absolutely unsupportable. App. C to pet., pages 68a, 71a, 83a n. 33. Congress spoke in broad terms because it wished to reach all possible benefits falling within the common meaning of bounty or grant. *See* Judge Miller's dissent, App. C to pet., pages 89a-90a n. 7. Indeed, as this Court said in *Nicholas* (249 U.S. at 39):

> "If the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance than 'grant' could not have been used. Like its synonyms 'give' and 'bestow,' it expresses a concession,—the conferring of something by one person upon another. And if the 'something' be conferred by a country 'upon the exportation of any article or merchandise,' a countervailing duty is required by [the statute]."

[27] The majority stated: "Whether the Secretary could, however, under appropriate conditions, change present practice and begin to deem excise tax remission alone a bounty or grant is not before us." App. C to pet., page 82a n. 32.

as a matter of law, any determination by the Secretary of the Treasury regarding "economic result" would be irrelevant. We submit further that the Court below compounded its error by presuming that such a determination was made. Not only was it improper on procedural grounds to have based summary judgment on presumed facts, but clearly, the presumed economic determination was not made. Rather, the Secretary's determination not to countervail was premised on the following considerations, described in the Government's brief in opposition to certiorari, at 7:

> "The Secretary has adopted a bright-line distinction [between remissions of direct tax, which are deemed countervailable, and remissions of indirect tax, which are not] in order to facilitate administration of the statute and to assist the conduct of foreign trade relations. That distinction, moreover, has been adopted by the General Agreement on Tariffs and Trade, to which the United States is a party, and is accepted as a fundamental principle by every major trading nation in the world." [Footnote omitted.]

We submit that not only do the relevant GATT[28] rules have no force and effect as domestic law (as the

[28] The General Agreement on Tariffs and Trade ("GATT"), 61 Stat. All (1947), contains a countervailing duty provision in Part II, Article VI. Unlike section 303 of the Tariff Act, Article VI of the GATT provides:

> "4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."

In 1955, the following was added to the GATT, as ad Article XVI of Annex I:

Government and the Courts below recognize) but an examination of said rules (and the indirect-direct tax distinction) will reveal that they (1) were premised on false assumptions, (2) provide for unfair rather than neutral treatment to nations, such as the United States, which depend primarily on direct taxes for revenue, and (3) have been soundly criticized by the United States for not being trade neutral and for favoring the exports of countries depending primarily on indirect taxes.

The GATT's permitting the remission of indirect taxes but not direct taxes on export was based, in part,

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"The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." [1 GATT, *Basic Instruments and Selected Documents* [BISD], at 67 (1955).]

Subsequently, in a Working Party Report adopted by the contracting parties to GATT, practices which were considered to be deemed subsidies were "[t]he exemption, in respect of exported goods, of charges or taxes, other than charges in connexion with importation or indirect taxes levied at one or several stages on the same goods if sold for internal consumption; or the payment, in respect of exported goods, of amounts exceeding those effectively levied at one or several stages on these goods in the form of indirect taxes or of charges in connexion with importation or in both forms . . ." GATT, *Basic Instruments and Selected Documents* [BISD] 9th Supp., at 186-187 (1961).

It is not really disputed that these GATT rules play no role whatsoever in our domestic law. Not only has Congress never delegated any authority to the Executive Branch to amend the countervailing duty law, but when the United States acceded to GATT, it agreed to undertake the relevant part "to the fullest extent not inconsistent with existing legislation." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. A2051 (1947). *See American Express Company* v. *United States*, 472 F.2d 1050, 1059 n. 14 (C.C.P.A. 1973). *See also* opinions of Judges Richardson and Newman of the Customs Court in this case, App. A to pet., pages 13a-14a and 29a-30a, respectively, and the majority opinion of the Court below, App. C to pet., page 76a n. 21.

on theories of tax incidence, which held that the former (indirect taxes) shift fully forward, while the latter (direct taxes) were fully absorbed by the seller. Thus, the theory goes, whether a product is sold in a foreign country for home consumption at a price of $1.10, including a $.10 tax, or for export at $1.00, excluding such tax, the profit experienced by the seller would be the same in either transaction, and there would be no inducement to seek the export market. [Additionally, the GATT permits the border tax adjustment on imports, *i.e.*, the assessment of tax to place imports on "equal" footing with domestically produced and taxed merchandise. GATT, Articles II and III.]

There are at least two fundamental problems with the GATT plan. Firstly, it totally ignores the logic of this Court's teachings that the remission on export of a tax (or any other cost) encourages or facilitates the sale of a product in a new market. *Passavant, Downs, Nicholas, supra.* Secondly, the two underlying assumptions, *i.e.*, that indirect taxes shift fully forward and that direct taxes are fully absorbed by the seller have been demonstrated to be plainly false. *See, e.g.*, Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 Law and Pol. Int'l Bus. 327, 351-355 (1975). The United States, in particular, has repeatedly expressed its recognition that the assumptions were false and the results unfair. *See, e.g., The United States Submission on Border Tax Adjustments, February 16, 1966,* to Workng Party No. 4 of the Council on Border Tax Adjustments, Organisation for Economic Co-operation and Development. App. 93-116. In this submission, it was repeatedly noted that indirect taxes do not

shift fully forward into the price of products. At App. 95, the following analysis was offered:

> "[T]he imposition of excise taxes and sales taxes are considered to be no different from increases in other kinds of costs. The domestic price of the product is increased to some extent by the tax (although only in exceptional cases such as cigarettes does it verge on an increase equal to the full amount of the tax) and in most cases reduces the quantity of the product demanded in the domestic market. The price *net of tax* therefore is lower, and a border tax adjustment involving a full refund of the tax to the exporter makes export sales relatively more profitable than before, thereby acting as an incentive to export the taxed combodity." [Emphasis in original.]

In his 1968 Balance of Payments Address, President Johnson focused on the very same problem (4 Weekly Comp. Pres. Docs. 25 (1968)):

> "We must now look beyond the great success of the Kennedy Round to the problems of nontariff barriers that pose a continued threat to the growth of world trade and to our competitive position. American commerce is at a disadvantage because of the tax system of some of our trading partners. Some nations give across-the-board rebates on exports which leave their port and impose special border tax charges on our goods entering their country.
>
> "International rules govern these special taxes under the General Agreement on Tariffs and Trade. These rules must be adjusted to expand international trade further."

In April of 1968, the Special Trade Representative made a statement on border taxes before a GATT Working Party which continued the United States assault

on the system. [Statement is reprinted in *Hearings on World Trade and Investment Issues, supra,* at 1005.] After pointing to the false assumptions pertaining to tax shifting, he stated (*id.* at 1008):

> "In summary, the present GATT provisions on border tax adjustments do not neutralize the effects of taxes on trade. Instead they are export promoting and import restricting for the indirect tax countries. The basic assumptions underlying the GATT provisions are not realistic. The full border tax adjustment provided for with respect to indirect taxes constitutes both an export subsidy and an import surcharge."

He went on to say (*id.* at 1010):

> "We question whether there is a sound conceptual basis for any general border tax adjustments."

Developing this theme, former Assistant Secretary of the Treasury, John R. Petty, detailed the dissatisfaction of the United States with the present GATT rules in a paper for the Twenty-first Annual Conference of the Canadian Tax Foundation, Toronto, November 20, 1968 [App. 117-138], where he stated:

> "Modern economic theory suggests that the distinction implicit in the GATT treatment of direct and indirect taxes is an extreme and arbitrary assumption which does not stand the test of economic reality. While economists and businessmen may disagree on the extent of the forward shifting of indirect and direct taxes, they do agree that the extreme assumptions which are necessary to make the present GATT rules trade neutral are an inadequate approximation of reality. Therefore, a border adjustment equivalent to the full internal indirect tax tends to stimulate exports and provide protection against imports. In brief, the present provisions of GATT divert trade and thereby disadvan-

tage countries such as the United States and Canada which rely primarily on direct taxes." [App. 132-133; footnotes omitted.] [29]

In 1971, the Hon. John B. Connally, then Secretary of the Treasury, also acknowledged that the GATT rules on border tax adjustments made no sense. *Hearings on World Trade and Investment Issues, supra,* at 44-45.

In 1975, former Assistant Secretary of the Treasury David R. Macdonald stated at a press conference [copy of Transcript appears at App. 78-92], with respect to the United States Steel Corporation's complaint that the remission of value-added taxes (which he likened to the commodity tax—App. 87) constitutes a bounty or grant (App. 80):

"... I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this

[29] Earlier, Mr. Petty explained that the GATT rules were evidently developed without much concern for the consequences. He stated:

"Little wonder! In the late 1940's and early 1950's, border tax rates were low—in the range of 2% to 4%—and limited to around one-sixth of the goods traded—and then only in the case of a few nations. Furthermore, a seller's market existed in which demand was highly unresponsive to small price variations. Finally, the $10 billion commercial trade surplus of the United States in 1947 must have had an effect on the attitude of the United States' negotiators. This is best illustrated by the then-prevalent and understandable United States' policy of deliberately encouraging a transfer of financial assets to Western Europe in order to facilitate European reconstruction." [App. 123.]

To the same effect, see Staff of Senate Comm. on Finance, *Staff Analysis of Certain Issues Raised by the General Agreement on Tariffs and Trade,* 91st Cong., 2d Sess. (1970), reported in *Hearings on World Trade and Investment Issues, supra,* at 919.

sort. In fact, if there was one thing that was quite persuasive in the petition filed by U. S. Steel, it was their economic argument that, *in fact,* there should be no distinction between direct and indirect taxes.

"We believe that, while we are making this decision in consonance with our prior precedents—we believe that this is a subject which requires very serious negotiations because the distinction between so-called 'direct' taxes and so-called 'indirect' taxes, economically speaking, may well be chimerical." [Emphasis in original.]

Thus, in view of all the foregoing, it is clear that the decision not to countervail was not predicated on economic analysis. Quite the contrary, the export subsidy and trade distortive effect of indirect tax remission has long been recognized by the Executive Branch.

CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the Court below should be reversed and the case should be remanded to enable that Court to decide the proper effective date for duty assessment purposes. *See* n. 4, *supra*.

Respectfully submitted,

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Appendix

APPENDIX TO BRIEF

Statutes

Section 5 of the Tariff Act of 1897, 30 Stat. 151, 205:

That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 6 of the Tariff Act of 1909, 36 Stat. 11, 85:

That whenever any country, dependency, colony, province or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether

such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or other wise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section IV, paragraph E. of the Tariff Act of 1913, 38 Stat. 114, 193:

That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this act, then upon the importatation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1922, 42 Stat. 858, 935:

That whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 (1970) (amended 1975):

COUNTERVAILING DUTIES.

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of govern-

ment, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (Supp. V 1975):

COUNTERVAILING DUTIES.

(a) *Levy of countervailing duties.*

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by

remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) of this section; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the "Secretary") has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed.

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within six months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within twelve months from such date shall make a final

determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

(6) The Secretary shall make all regulations he deems necessary for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b)(1) or this section (whether affirmative or negative) shall be published in the Federal Register.

(b) *Injury determination with respect to duty-free merchandise; suspension of liquidation.*

(1) Whenever the Secretary makes a final determination under subsection (a) of this section that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2) of this section, he shall—

(A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the publication

in the Federal Register of his final determination under subsection (a) of this section, and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (3).

(2) For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the commissioners voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

(3) If the determination of the Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a) of this section.

(c) *Application of affirmative determinations.*

An affirmative final determination by the Secretary under subsection (a) of this section with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1) of this section.

(d) *Temporary provision while negotiations are in progress.*

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with United

States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem apropriate, the Secretary of the Treasury determines, at any time during the four-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such four-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting

such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

(e) *Reports to Congress.*

(1) Whenever the Secretary makes a determination under subsection (d)(2) of this section with respect to any article or merchandise, he shall promptly transmit to the House of Representatives and the Senate a document setting forth the determination, together with his reasons therefor.

(2) If, at any time after the document referred to in paragraph (1) is delivered to the House of Representatives and the Senate, either the House or the Senate adopts, by an affirmative vote of a majority of those present and voting in that House, a resolution of disapproval under the procedures set forth in section 2192 of this title, then such determination under subsection (d)(2) of this section with respect to such article or merchandise shall have no force or effect beginning with the day after the date of the adoption of such resolution of disapproval, and the additional duty provided under this section with respect to such article or merchandise shall apply with respect to articles or merchandise entered, or withdrawn from warehouse, for consumption on or after such day.

Section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. V 1975):

PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS.

(a) *Classification, rate of duty, countervailing duty, and antidumping duty furnished upon request; petition; contents.*

The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duties"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reason for his belief that countervailing duties or antidumping duties should be assessed.

(b) *Determination of petition; notification to petitioner; procedures for countervailing duties and antidumping duties.*

If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article

or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) *Determination of correctness of initial appraised value, classification, rate of duty, or non-assessment of countervailing duties or antidumping duties; contest by petitioner; procedure.*

If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties

should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

(d) *Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid.*

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(e) *Appraisal, classification, and liquidation of entries of merchandise covered by published decisions of the Secretary.*

Notwithstanding the filing of an action pursuant to section 2632 of title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) *Consignee or his agent as party in interest before the Customs Court.*

The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) *Appraisement, classification, and assessment of duty of merchandise covered by published decision of the Secretary in accordance with final judicial decision of Customs Court or Court of Customs and Patent Appeals sustaining cause of action in whole or in part; suspension of liquidation of entries.*

If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consump-

tion or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) *Regulations implementing required procedures.*

Regulations shall be prescribed by the Secretary to implement the procedures required under this section.

Section 102 of the Trade Act of 1974, 19 U.S.C. § 2112 (Supp. V 1975):

§ 2112. NONTARIFF BARRIERS TO AND OTHER DISTORTIONS OF TRADE.

(a) *Congressional findings; directives; disavowal of prior approval of legislation.*

The Congress finds that barriers to (and other distortions of) international trade are reducing the growth of foreign markets for the products of United States agriculture, industry, mining, and commerce, diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations. The President is urged to take all appropriate and feasible steps within his power (including the full exercise of the rights of the United States under international agreements) to harmonize, reduce, or eliminate such barriers to (and other distortions of) international trade. The President is further urged to utilize the authority granted by subsection (b) of this section to negotiate trade agreements with other

countries and instrumentalities providing on a basis of mutuality for the harmonization, reduction, or elimination of such barriers to (and other distortions of) international trade. Nothing in this subsection shall be construed as prior approval of any legislation which may be necessary to implement an agrement concerning barriers to (or other distortions of) international trade.

(b) *Presidential determinations prerequisite to entry into trade agreements.*

Whenever the President determines that any barriers to (or other distortions of) international trade of any foreign country or the United States unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy, or that the imposition of such barriers is likely to result in such a burden, restriction, or effect, and that the purposes of this chapter will be promoted thereby, the President, during the 5-year period beginning on January 3, 1975, may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions).

(c) *Presidential consultation with Congress prior to entry into trade agreements.*

Before the President enters into any trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such trade agreement. Such consultation shall include all matters

relating to the implementation of such trade agreement as provided in subsections (d) and (e) of this section. If it is proposed to implement such trade agreement, together with one or more other trade agrements entered into under this section, in a single implementing bill, such consultation shall include the desirability and feasibility of such proposed implementation.

(d) *Submission to Congress of agreements, drafts of implementing bills, and statements of proposed administrative action.*

Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementing bill (described in section 2191(b) of this title) and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in subsection (e) of this section, and such agreement shall enter into force with respect to the United States only if the provisions of subsection (e) of this section are complied with and the implementing bill submitted by the President is enacted into law.

(e) *Steps prerequisite to entry into force of trade agreements.*

Each trade agreement submitted to the Congress under this subsection shall enter into force with respect to the United States if (and only if)—

(1) the President, not less than 90 days before the day on which he enters into such trade agreement, notifies the House of Representatives and the Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(2) after entering into the agreement, the President transmits a document to the House of Representatives and to the Senate containing a copy of such agreement together with—

(A) a draft of an implementing bill and a statement of any administrative action proposed to implement such agreement, and an explanation as to how the implementing bill and proposed administrative action change or affect existing law, and

(B) a statement of his reasons as to how the agreement serves the interests of United States commerce and as to why the implementing bill and proposed administrative action is required or appropriate to carry out the agreement; and

(3) the implementing bill is enacted into law.

(f) *Obligations imposed upon foreign countries or instrumentalities receiving benefits under trade agreements.*

To insure that a foreign country or instrumentality which receives benefits under a trade agreement entered into under this section is subject to the obligations imposed by such agreement, the President may recommend to Congress in the implementing bill and statement of administrative action submitted with respect to such agreement that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement. The President may also recommend with respect to any such agrement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agrement.

(g) *Definitions.*

For purposes of this section—

(1) the term "barrier" includes the American selling price basis of customs evaluation as defined in section 1401a or 1402 of this title, as appropriate;

(2) the term "distortion" includes a subsidy; and

(3) the term "international trade" includes trade in both goods and services.

Section 331(d) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2049, 2053 (1975).

Amendments to Section 303 and 516 of the Tariff Act of 1930.

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(d)(1) The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) For purposes of applying the provisions of section 303(a)(4) of the Tariff Act of 1930 (as amended by subsection (a)) with respect to any investigation which was initiated before the date of the enactment of this Act under section 303 of such Act (as in effect before such date), such investigation shall be treated as having been initiated on the day after such date of enactment under section 303(a)(3)(B) of such Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).

Section 203 of the Antidumping Act of 1921, 19 U.S.C. § 162 (1970) (amended 1975):

Purchase price

For the purposes of this section and sections 160-171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased

or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and plus the amount, if not included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, in respect to the manufacture, production, or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.

Unenacted Bills

H.R. 6767, 93d Cong., 1st Sess., § 330 (1973):

SEC. 330. AMENDMENTS TO SECTION 303 OF THE TARIFF ACT OF 1930.

(a) Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) is amended to read:

"SEC. 303. COUNTERVAILING DUTIES.

"(a) LEVY OF COUNTERVAILING DUTIES.—

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person,

partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

"The Secretary of the Treasury shall determine within twelve months after the date on which the question is presented to him whether any bounty or grant is being paid or bestowed.

"(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Tariff Commission under subsection (b)(1): *Provided, however,* That such a Tariff Commission determination shall be required only for such time as a determination of injury is required by the international obligations of the United States.

"(3) The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

"(4) Whenever, in the case of any imported article or merchandise as to which the Secretary has not determined whether a bounty or grant is being paid or bestowed, the Secretary concludes, from information presented to him or to any person to whom authority under this section has

been delegated, that a formal investigation into the question of whether a bounty or grant is being paid or bestowed is warranted, he shall forthwith publish notice of the initiation of such an investigation in the Federal Register. The date of publication of such notice shall be considered the date on which the question is presented to the Secretary within the meaning of subsection (a)(1).

"(5) The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of the duties under this section. All determinations by the Secretary under this subsection and all determinations by the Tariff Commission under subsection (b)(1), whether affirmative or negative, shall be published in the Federal Register.

"(b) INJURY DETERMINATIONS WITH RESPECT TO DUTY-FREE MERCHANDISE; SUSPENSION OF LIQUIDATION.—

(1) Whenever the Secretary of the Treasury has determined under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty, he shall—

"(A) so advise the United States Tariff Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be materially injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

"(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption, on or after the thirtieth day after

the date of the publication in the Federal Register of his determination under subsection (a)(1), and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public an order as provided for in paragraph (2) of this subsection.

"(2) If the determination of the Tariff Commission under subparagraph (A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a).

"(c) APPLICATION OF AFFIRMATIVE DETERMINATION.—

An affirmative determination by the Secretary of the Treasury under subsection (a)(1) with respect to any imported article or merchandise which (1) is dutiable, or (2) is free of duty and with respect to which the Tariff Commission has made an affirmative determination under subsection (b)(1) (for such time as a finding of injury is required by the international obligations of the United States), shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the thirtieth day after the date of the publication in the Federal Register of such determination.

"(d) DISCRETIONARY IMPOSITION OF COUNTERVAILING DUTIES.—

Whenever the Secretary determines, after seeking information and advice from such agencies as he may deem appropriate, that—

"(1) the imposition of an additional duty under this section upon any article would result, or be likely to result in significant detriment to the economic interests of the United States; or

"(2) that any article is subject to the a [*sic*] quantitative limitation imposed by the United States on its importation into, or subject to an effective quantitative limitation on its exportation to, the United States and that such quantitative limitation is an adequate substitute for the imposition of a duty under this section;

the imposition of an additional duty under this section shall not be required."

(b)(1) Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The last sentence of section 303(a)(1) of the Tariff Act of 1930 (as added by subsection (a) of this section) shall apply only with respect to questions presented on or after the date of the enactment of this Act.

(c) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title VI of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).

H.R. 10710, 93d Cong., 1st Sess., § 331 (1973):

SEC. 331. AMENDMENTS TO SECTIONS 303 AND 516 OF THE TARIFF ACT OF 1930.

(a) Section 303 of the Tariff Act of 1930 (19 U.S.C. sec. 1303) is amended to read as follows:

"SEC. 303. COUNTERVAILING DUTIES.

"(a) *Levy of Countervailing Duties.*—

(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon

the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall determine within twelve months after the date on which the question is presented to him whether any bounty or grant is being paid or bestowed.

"(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Tariff Commission under subsection (b)(1); except that such a Tariff Commission determination shall be required only for such time as a determination of injury is required by the international obligations of the United States.

"(3) The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

"(4) Whenever, in the case of any imported article or merchandise as to which the Secretary has not determined whether a bounty or grant is being paid or bestowed, the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation into the question of whether a bounty or grant is being paid or bestowed is warranted, he shall forthwith publish notice of the initiation of such an investigation in the Federal Register.

The date of publication of such notice shall be considered the date on which the question is presented to the Secretary within the meaning of subsection (a)(1).

"(5) The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of the duties under this section. All determinations by the Secretary under this section, and all determinations by the Tariff Commission under subsection (b)(1) (whether affirmative or negative), shall be published in the Federal Register.

"(b) *Injury Determinations With Respect to Duty-Free Merchandise; Suspension of Liquidation.*—

(1) Whenever the Secretary of the Treasury has determined under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty, he shall—

"(A) so advise the United States Tariff Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; and

"(B) require, under such regulations as he may prescribe, the suspension of liquidation as to such article or merchandise entered, or withdrawn from warehouse, for consumption, on or after the thirtieth day after the date of the publication in the Federal Register of his determination under subsection (a)(1), and such suspension of liquidation shall continue until the further order of the Secretary or until he has made public

an order as provided for in paragraph (3) of this subsection.

"(2) For the purposes of this subsection, the Tariff Commission shall be deemed to have made an affirmative determination if the Commissioners of such Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative.

"(3) If the determination of the Tariff Commission under paragraph (1)(A) is in the affirmative, the Secretary shall make public an order directing the assessment and collection of duties in the amount of such bounty or grant as is from time to time ascertained and determined, or estimated, under subsection (a).

"(c) *Application of Affirmative Determination.*—

An affirmative determination by the Secretary of the Treasury under subsection (a)(1) with respect to any imported article or merchandise shall apply with respect to articles entered, or withdrawn from warehouse, for consumption on or after the thirtieth day after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Tariff Commission make an affirmative determination of injury under subsection (b)(1).

"(d) *Articles Subject to Quantitative Limitations.*—

Whenever the Secretary determines, after seeking information and advice from such agencies as he may deem appropriate, that any article is subject to a quantitative limitation imposed by the United States on its importation into, or subject to an effective quantitative limitation on its exportation to, the United States and that such quantitative limitation is an adequate substitute for the imposition of a duty under this section, the imposition of an additional duty under this section shall not be required.

"(e) *Temporary Provision While Negotiations Are in Process.*—If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary determines, at any time before the day which is four years after the date of the enactment of this subsection, that the imposition of an additional duty under this section with respect to any article would be likely to seriously jeopardize the satisfactory completion of the negotiations contemplated by sections 101 and 102 of the Trade Reform Act of 1973, the imposition of such additional duty under this section with respect to such article shall not be required. In the case of a question presented on or after the day which is one year after the date of the enactment of this Act, this subsection shall not apply with respect to any article which is the product of facilities owned or controlled by a developed country if the investment in, or the operation of, such facilities, is subsidized."

(b) Section 516 of the Tariff Act of 1930 (19 U.S.C. sec. 1516) is amended to read as follows:

"SEC. 516. PETITIONS BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS.

"(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, and the additional duty described in section 303 of this Act (hereinafter in this section referred to as 'countervailing duties'), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he be-

lieves proper, and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties should be assessed.

"(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, and shall notify the petitioner of his determination. Except for countervailing duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 303 shall apply.

"(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) is correct, or that countervailing duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with

such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure to assess countervailing duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated."

(c)(1) Except as provided in paragraph (2), the amendments made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) The last sentence of section 303(a)(1) of the Tariff Act of 1930 (as added by subsection (a) of this section) shall apply only with respect to questions presented on or after the date of the enactment of this Act.

(3) Any article which is entered or withdrawn from warehouse free of duty as a result of action taken under title V of this Act shall be considered a nondutiable article for purposes of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. sec. 1303).